Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

MCI REPLY

MCI Telecommunications Corporation (MCI), by its attorneys, hereby replies to oppositions to MCI's Petition for Clarification and Partial Reconsideration (Petition) of the Second Report and Order (R&O) in the above-captioned proceeding.

I. The Commission Failed To Provide Adequate Notice That It Was Considering "Mandatory Detariffing" Of CMRS And CMRS Access.

In the Petition, MCI argued that the Commission failed to give requisite notice and opportunity to comment before adopting a sweeping requirement that "all commercial mobile radio service providers with tariffs on file with the Commission SHALL CANCEL such tariffs." (R&O, para. 289). MCI demonstrated that the Commission failed to give notice that detariffing was being considered for "CMRS access" as well as for "commercial mobile services provided to end users."

None of the parties responding to MCI's petition on this issue has demonstrated that the term "CMRS access" appears in the statute authorizing forbearance (the Omnibus Budget Reconciliation Act of 1993, OBRA), in the legislative history of OBRA, or in the Commission's Notice of Proposed Rulemaking in this proceeding. No

opposing party has demonstrated that the Commission gave notice of its intent to prohibit voluntary tariffing in the NPRM. The simple references to the Commission's proposal "to forbear from tariff regulation of the rates for commercial mobile services" (NPRM, para. 62 emphasis added) were interpreted by MCI in light of controlling judicial precedent, i.e., MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985). Even if footnotes 359[1/] and 363[2/] of the R&O are assumed to accurately characterize the governing law, they are plainly insufficient as substitutes for notice and opportunity to comment on "mandatory detariffing." Nor has any opposing party directly refuted MCI's assertion that the term "CMRS access" is not defined in the Commission's rules and is discussed in the R&O only in passing.[3/]

Opposing parties addressing the notice issue are reduced to efforts to link together disparate portions of the Commission's NPRM in a futile effort to demonstrate that adequate notice was given. For example, Pacific Bell (at 18) seeks to link paragraphs

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1/ There the Commission contends — for the first time in this proceeding — that mandatory detariffing is supported by the Sixth Report and Order in Competitive Carrier, without mentioning that the Sixth Report and Order — the Commission's only previous effort to "forbear from permitting the filing of tariffs" — was overturned on appeal in MCI v. FCC.

2/ There, the Commission claims that OBRA "superseded" the decision in MCI v. FCC.

3/ The only Commission document specifically identified by any opposing party which even touches upon cellular carriers' "access" tariffs is an (unpublished) October, 1988, letter by the Common Carrier Bureau Chief, apparently issued in the context of the Modified Final Judgment, a consent decree which applies, inter alia, to "exchange access" services offered by BOCs and their affiliates. See Bell Atlantic Opposition at 11, n. 12.

63 and 65 of the NPRM, contained in subsection D. 1. b. (ii) entitled "Forbearance from regulation", with paragraph 71, in which the Commission requested comment on interconnection and equal access. But paragraph 71 is not a portion of the forbearance section: it appears under "E. Other issues", within a separate major topic "1. Right to interconnection." Similarly, CTIA (at 4-5 and n. 8) asserts that a passing reference to the provision of access services in para. 59 of the NPRM (in subsection D. 1. b. (i), entitled "Legislation") gave adequate notice that the Commission was proposing detariffing of access services in the subsequent forbearance discussion (paras. 60-68), which is devoid of any mention of access services, and focuses entirely on "commercial mobile services provided to end users." (NPRM, para. 62).

No opposing party has shown that anyone not possessing superhuman powers of regulatory telepathy could reasonably be expected to discern from the Commission's NPRM that the Commission was considering detariffing of "CMRS access" services. Because adequate notice was not given, the Commission must vacate this aspect of its decision upon reconsideration.[4/]

[4/] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988); Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991); Fertilizer Institute v. EPA, 935 F.2d 1303 (D.C. Cir. 1991); National Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986).

II. Even Assuming Adequate Notice Was Given, The Record Does Not Justify Detariffing Of CMRS Access.

No party to this proceeding disputes the fact that Congress established a three-prong test which must be satisfied before the Commission may forbear from applying certain provisions of Title II to "commercial mobile services." The Commission, in applying the test with respect to tariffing, looked to the cellular industry and the comments filed in 1993 in response to a CTIA Petition for Rulemaking (NPRM, para. 63 and n. 83), and the prospects of PCS competition. Upon review of this limited record, the Commission deemed the test satisfied on a permanent basis as to "interstate service offered directly by CMRS providers to their customers" (R&O para. 179) and "temporarily" as to CMRS provider "tariffs for interstate access services." (Id.)

The Commission's decision to forbear from requiring or permitting CMRS providers to file tariffs for CMRS service or CMRS access is based upon an analysis of the cellular industry and its expectation of imminent competition from PCS licensees. It is not based upon a forward-looking analysis of CMRS. Extrapolations from cellular (past or present) to the future CMRS market are flawed in a number of important respects. For example, the Commission requires the Bell Operating Companies (seven of the largest cellular providers nationwide) to maintain separate subsidiaries for the rendition of cellular service, but no local exchange carrier will be required to maintain structural separation for PCS. Cellular carriers may not provide wireless local loop services

unless they demonstrate that they hold any state authorization required to provide Basic Exchange Telecommunications Radio Service (BETRS). In contrast, the Commission's PCS decisions envision that "wireless local loop" services and equivalents will be among the major uses of the 10 MHz broadband PCS blocks. Not only is structural separation not required for LEC participation in PCS, but some PCS architectures permit a single LEC central office (Class 5 switch) to serve wireless customers and conventional wireline customers.[5/] In CMRS, a LEC's Class 5 switch may be used to provide "CMRS end user offerings," "CMRS access," "local exchange service," "exchange access service," and "CMRS interconnection." Pacific Bell's assertion (at 19) to the contrary notwithstanding, the Commission's failure to consider the complex jurisdictional and cost allocation issues associated with LEC provision of multiple services via a common switch "may result in the detariffing of a substantial portion of LEC interstate access offerings." (MCI Petition at 11.) Although submitted in response to the cellular resellers' petition, the Hausman affidavit attached to the opposition of PacBell's former affiliate, Airtouch, identifies some of the contentious issues inevitably raised when the costs of a Class 5 switch providing multiple functions must be allocated among services.

The Commission, in para. 64 of the NPRM acknowledged that "[s]ome commercial mobile service providers will be affiliated with

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[5/] See, e.g., "Generic Framework Criteria for Version 1.0 Wireless Access Communications Systems (WACS)" Bellcore FA-NWT-001318, Issue 1, June 1992.

dominant common carriers" and sought comment on whether safeguards should be imposed to ensure that the dominant carrier "does not act anticompetitively." The Commission, when it issued the NPRM, obviously deemed affiliation with dominant common carriers to be relevant to its analysis of the forbearance issue.[6] However, the entirety of the Commission's discussion of tariff forbearance (R&O, paras. 173-179) is devoted exclusively to a discussion of cellular carriers and non-dominant carriers, with no mention whatsoever of the issue of whether safeguards should be applied to CMRS affiliates of dominant carriers. If the Commission, upon review of the record, determined that dominant carrier affiliation provided no basis for additional safeguards, it was obligated to explain its rationale. The Commission's handling — or, rather, non-handling — of this issue clearly crosses the forbidden line between the "tolerably terse" and the "intolerably mute."[7]

It is clear that the CMRS marketplace envisioned by the Commission will differ from the existing cellular market in several significant respects, including increased flexibility for LECs to provide a broad range of wireless services directly, rather than through separate subsidiaries. The record amassed in this

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[6] It was the Commission, not MCI, which first raised the issue of whether a dominant/non-dominant dichotomy might be applied in the context of forbearance. The criticisms which Ameritech (at 2), GTE (at 6) and McCaw (at 10) have leveled at MCI on this score are thus misdirected.

[7] Telephone and Data Systems, Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994); Action for Children's Television v. FCC, 821 F.2d 741, 746 (D.C. Cir. 1987); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970).

proceeding to date, based entirely on the cellular industry of today instead of CMRS in its entirety, is — if not totally irrelevant — plainly insufficient to support a Commission finding that the three-prong test set forth in the statute has been met. Before the Commission may lawfully conclude that tariff forbearance (either permissive or mandatory), it must revisit these issues in a further rulemaking.[8/]

The Commission's decision to only "temporarily" forbear from permitting or requiring the tariffing of interstate access services (R&O at para. 179), accompanied by a promise to reexamine this decision in future proceedings addressing interconnection issues (Id.) does not — contrary to the claims of Sprint (at 6) and Bell Atlantic (at 12) — render MCI's concerns moot or provide an adequate remedy. MCI is not alone in challenging the Commission's assertion that OBRA empowered it to forbear from requiring or permitting the tariffing of "CMRS access" as well as "CMRS." See, e.g., the petitions of NARUC, NYDPS, PaPUC and California, asserting that OBRA reserved to the states exclusive authority over

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[8/] Several issues raised on reconsideration are already hotly contested and will likely require extended review. These include, but are not limited to, dominant carrier safeguards, the scope of the Commission's forbearance and preemption authority (particularly with respect to CMRS access/interconnection) and the "enhanced services" issue raised by GTE (Petition at 6-10). On the other hand, permissive detariffing of CMRS end user offerings of providers who are neither dominant carriers nor dominant carrier affiliates could be addressed on an expedited basis. This would minimize delay in the effective date of permissive detariffing of those services which are clearly CMRS, thereby addressing the concerns of parties such as Watercom (Response at 4-5), Southern (Opposition at 5) and PageNet (Comments at 3).

intrastate "CMRS interconnection" rates. It is incumbent upon the Commission — especially in light of the June 17 decision of the Supreme Court in MCI v. AT&T, the latest in a series of decisions narrowly construing the Commission's detariffing authority — to revisit its detariffing rulings in this docket.

Conclusion

WHEREFORE, MCI requests that the Commission, upon reconsideration, modify and clarify the Second Report and Order in the above-captioned proceeding as set forth herein and in MCI's petition for partial reconsideration and clarification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vernell V. Garey, hereby certify that on this 30th day of June, 1994, copies of the foregoing **"MCI REPLY"** in GN Docket No. 93-252 were served by first-class mail, postage prepaid upon the parties on the list below, except as otherwise indicated.

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